

## **Appendix A - Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks**

DEPARTMENT OF DEFENSE  
Department of the Army, Corps of Engineers  
ENVIRONMENTAL PROTECTION AGENCY  
DEPARTMENT OF AGRICULTURE  
Natural Resources Conservation Service  
DEPARTMENT OF THE INTERIOR  
Fish and Wildlife Service  
DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration

### **Federal Guidance for the Establishment, Use and Operation of Mitigation Banks**

**AGENCIES:** Corps of Engineers, Department of Army, DOD; Environmental Protection Agency; Natural Resources Conservation Service, Agriculture; Fish and Wildlife Service, Interior; and National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

### **ACTION:** Notice

**SUMMARY:** The Army Corps of Engineers (Corps), Environmental Protection Agency (EPA), National Resources Conservation Service (NRCS), Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) are issuing final policy guidance regarding the establishment, use and operation of mitigation banks for the purpose of providing compensation for adverse impacts to wetlands and other aquatic resources. The purpose of this guidance is to clarify the manner in which mitigation banks may be used to satisfy mitigation requirements of the Clean Water Act (CWA) Section 404 permit program and the wetland conservation provisions of the Food Security Act (FSA) (i.e., "Swampbuster" provisions). Recognizing the potential benefits mitigation banking offers for streamlining the permit evaluation process and providing more effective mitigation for authorized impacts to wetlands, the agencies encourage the establishment and appropriate use of mitigation banks in the Section 404 and "Swampbuster" programs.

**DATES:** The effective date of this Memorandum to the Field is December 28, 1995.

**FOR FURTHER INFORMATION CONTACT:** Mr. Jack Chowning (Corps) at (202) 761-[[Page 58606]] 1781; Mr. Thomas Kelsch (EPA) at (202) 260-8795; Ms. Sandra Byrd (NRCS) at (202) 690-3501; Mr. Mark Miller (FWS) at (703) 358-2183; Ms. Susan-Marie Stedman (NMFS) at (301) 713-2325.

**SUPPLEMENTARY INFORMATION:** Mitigating the environmental impacts of necessary development actions on the Nation's wetlands and other aquatic resources is a central premise of Federal wetlands programs. The CWA Section 404 permit program relies on the use of compensatory mitigation to offset unavoidable damage to wetlands and other aquatic resources through, for example, the restoration or creation of wetlands. Under the "Swampbuster" provisions of the FSA, farmers are required to provide mitigation to offset certain conversions of wetlands for agricultural purposes in order to maintain their program eligibility.

Mitigation banking has been defined as wetland restoration, creation, enhancement, and in exceptional circumstances, preservation undertaken expressly for the purpose of compensating for unavoidable wetland losses in advance of development actions, when such compensation cannot be achieved at the

development site or would not be as environmentally beneficial. It typically involves the consolidation of small, fragmented wetland mitigation projects into one large contiguous site. Units of restored, created, enhanced or preserved wetlands are expressed as "credits" which may subsequently be withdrawn to offset "debits" incurred at a project development site.

Ideally, mitigation banks are constructed and functioning in advance of development impacts, and are seen as a way of reducing uncertainty in the CWA Section 404 permit program or the FSA "Swampbuster" program by having established compensatory mitigation credit available to an applicant. By consolidating compensation requirements, banks can more effectively replace lost wetland functions within a watershed, as well as provide economies of scale relating to the planning, implementation, monitoring and management of mitigation projects.

On August 23, 1993, the Clinton Administration released a comprehensive package of improvements to Federal wetlands programs which included support for the use of mitigation banks. At that same time, EPA and the Department of the Army issued interim guidance clarifying the role of mitigation banks in the Section 404 permit program and providing general guidelines for their establishment and use. In that document it was acknowledged that additional guidance would be developed, as necessary, following completion of the first phase of the Corps Institute for Water Resources national study on mitigation banking.

The Corps, EPA, NRCS, FWS and NMFS provided notice [60 FR 12286; March 6, 1995] of a proposed guidance on the policy of the Federal government regarding the establishment, use and operation of mitigation banks. The proposed guidance was based, in part, on the experiences to date with mitigation banking, as well as other environmental, economic and institutional issues identified through the Corps national study. Over 130 comments were received on the proposed guidance. The final guidance is based on full and thorough consideration of the public comments received.

A majority of the letters received supported the proposed guidance in general, but suggested modifications to one or more parts of the proposal. In response to these comments, several changes have been made to further clarify the provisions and make other modifications, as necessary, to ensure effective establishment and use of mitigation banks. One key issue on which the agencies received numerous comments focused on the timing of credit withdrawal. In order to provide additional clarification of the changes made to the final guidance in response to comments, the agencies wish to emphasize that it is our intent to ensure that decisions to allow credits to be withdrawn from a mitigation bank in advance of bank maturity be made on a case-by-case basis to best reflect the particular ecological and economic circumstances of each bank. The percentage of advance credits permitted for a particular bank may be higher or lower than the 15 percent example included in the proposed guidance. The final guidance is being revised to eliminate the reference to a specific percentage in order to provide needed flexibility. Copies of the comments and the agencies' response to significant comments are available for public review. Interested parties should contact the agency representatives for additional information.

This guidance does not change the substantive requirements of the Section 404 permit program or the FSA "Swampbuster" program. Rather, it interprets and provides internal guidance and procedures to the agency field personnel for the establishment, use and operation of mitigation banks consistent with existing regulations and policies of each program. The policies set out in this document are not final agency action, but are intended solely as guidance. The guidance is not intended, nor can it be relied upon, to create any rights enforceable by any party in litigation with the United States. The guidance does not establish or affect legal rights or obligations, establish a binding norm on any party and it is not finally determinative of the issues addressed. Any regulatory decisions made by the agencies in any particular matter addressed by this guidance will be made by applying the governing law and regulations to the relevant facts. The purpose of

the document is to provide policy and technical guidance to encourage the effective use of mitigation banks as a means of compensating for the authorized loss of wetlands and other aquatic resources.

*John H. Zirschky, Acting Assistant Secretary (Civil Works), Department of the Army.*

*Robert Perciasepe, Assistant Administrator for Water, Environmental Protection Agency.*

*James R. Lyons, Assistant Secretary, Natural Resources and Environment, Department of Agriculture.*

*George T. Frampton, Jr., Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior.*

*Douglas K. Hall, Assistant Secretary for Oceans and Atmosphere, Department of Commerce.*

## **MEMORANDUM TO THE FIELD**

**SUBJECT: Federal Guidance for the Establishment, Use and Operation of Mitigation Banks**

### **I. Introduction**

#### **A. Purpose and Scope of Guidance**

This document provides policy guidance for the establishment, use and operation of mitigation banks for the purpose of providing compensatory mitigation for authorized adverse impacts to wetlands and other aquatic resources. This guidance is provided expressly to assist Federal personnel, bank sponsors, and others in meeting the requirements of Section 404 of the Clean Water Act (CWA), Section 10 of the Rivers and Harbors Act, the wetland conservation provisions of the Food Security Act (FS) (i.e., "Swampbuster"), and other applicable Federal statutes and regulations. The policies and procedures discussed herein are consistent with current requirements of the Section 10/404 regulatory program and "Swampbuster" provisions and are intended only to clarify the applicability of existing requirements to mitigation banking. **[[Page 58607]]**

The policies and procedures discussed herein are applicable to the establishment, use and operation of public mitigation banks, as well as privately-sponsored mitigation banks, including third party banks (e.g., entrepreneurial banks).

#### **B. Background**

For purposes of this guidance, mitigation banking means the restoration, creation, enhancement and, in exceptional circumstances, preservation of wetlands and/or other aquatic resources expressly for the purpose of providing compensatory mitigation in advance of authorized impacts to similar resources.

The objective of a mitigation bank is to provide for the replacement of the chemical, physical and biological functions of wetlands and other aquatic resources which are lost as a result of authorized impacts. Using appropriate methods, the newly established functions are quantified as mitigation "credits" which are available for use by the bank sponsor or by other parties to compensate for adverse impacts (i.e., "debits"). Consistent with mitigation policies established under the Council on Environmental Quality Implementing Regulations (CEQ regulations) (40 CFR Part 1508.20), and the Section 404(b)(1) Guidelines (Guidelines) (40 CFR Part 230), the use of credits may only be authorized for purposes of complying with Section 10/404 when adverse impacts are unavoidable. In addition, for both the Section 10/404 and "Swampbuster" programs, credits may only be authorized when on-site compensation is either not practicable or use of a

mitigation bank is environmentally preferable to on-site compensation. Prospective bank sponsors should not construe or anticipate participation in the establishment of a mitigation bank as ultimate authorization for specific projects, as excepting such projects from any applicable requirements, or as preauthorizing the use of credits from that bank for any particular project.

Mitigation banks provide greater flexibility to applicants needing to comply with mitigation requirements and can have several advantages over individual mitigation projects, some of which are listed below:

1. It may be more advantageous for maintaining the integrity of the aquatic ecosystem to consolidate compensatory mitigation into a single large parcel or contiguous parcels when ecologically appropriate;
2. Establishment of a mitigation bank can bring together financial resources, planning and scientific expertise not practicable to many project-specific compensatory mitigation proposals. This consolidation of resources can increase the potential for the establishment and long-term management of successful mitigation that maximizes opportunities for contributing to biodiversity and/or watershed function;
3. Use of mitigation banks may reduce permit processing times and provide more cost-effective compensatory mitigation opportunities for projects that qualify;
4. Compensatory mitigation is typically implemented and functioning in advance of project impacts, thereby reducing temporal losses of aquatic functions and uncertainty over whether the mitigation will be successful in offsetting project impacts;
5. Consolidation of compensatory mitigation within a mitigation bank increases the efficiency of limited agency resources in the review and compliance monitoring of mitigation projects, and thus improves the reliability of efforts to restore, create or enhance wetlands for mitigation purposes.
6. The existence of mitigation banks can contribute towards attainment of the goal for no overall net loss of the Nation's wetlands by providing opportunities to compensate for authorized impacts when mitigation might not otherwise be appropriate or practicable.

## **II. POLICY CONSIDERATIONS**

The following policy considerations provide general guidance for the establishment, use and operation of mitigation banks. It is the agencies' intent that this guidance be applied to mitigation bank proposals submitted for approval on or after the effective date of this guidance and to those in early stages of planning or development. It is not intended that this policy be retroactive for mitigation banks that have already received agency approval. While it is recognized that individual mitigation banking proposals may vary, it is the intent of this guidance that the fundamental precepts be applicable to future mitigation banks.

For the purposes of Section 10/104, and consistent with the CEQ regulations, the Guidelines, and the Memorandum of Agreement Between the Environmental Protection Agency (EPA) and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines, mitigation means sequentially avoiding impacts, minimizing impacts, and compensating for remaining unavoidable impacts. Compensatory mitigation, under Section 10/404, is the restoration, creation, enhancement, or in exceptional circumstances, preservation of wetlands and/or other aquatic resources for the purpose of compensating for unavoidable adverse impacts. A site where wetlands and/or other aquatic resources are restored, created, enhanced, or in exceptional circumstances, preserved expressly for the purpose of providing compensatory mitigation in advance of authorized impacts to similar resources is a mitigation bank.

#### *A. Authorities*

This guidance is established in accordance with the following statutes, regulations, and policies. It is intended to clarify provisions within these existing authorities and does to establish any new requirements.

1. Clean Water Act Section 404 (33 U.S.C. 1344).
2. Rivers and Harbors Act of 1899 Section 10 (33 U.S.C. 403 et seq.)
3. Environmental Protection Agency, Section 404(b)(1) Guidelines (40 CFR Part 230). Guidelines for Specification of Disposal Sites for Dredged or Fill Material:
4. Department of the Army, Section 404 Permit Regulations (33 CFR Parts 320-330). Policies for evaluating permit applications to discharge dredged or fill material.
5. Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines (February 6, 1990).
6. Title XII Food Security Act of 1985 as amended by the Food, Agriculture, Conservation and Trade Act of 1990 (16 U.S.C. 3801 et seq.).
7. National Environmental Policy Act (42 U.S.C. 4321 et seq.), including the Council on Environmental Quality's implementing regulations (40 CFR Parts 1500-1508).
8. Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.).
9. Fish and Wildlife Service Mitigation Policy (46 FR pages 7644-7663, 1981).
10. Magnuson Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.).
11. National Marine Fisheries Service Habitat Conservation Policy (48 FR pages 53142-53147, 1983).

The policies set out in this document are not final agency action, but are intended solely as guidance. The guidance is not intended, nor can it be relied upon, to create any rights **[[Page 58608]]** enforceable by any party in litigation with the United States. This guidance does not establish or affect legal rights or obligations, establish a binding norm on any party and it is not finally determinative of the issues addressed. Any regulatory decisions made by the agencies in any particular matter addressed by this guidance will be made by applying the governing law and regulations to the relevant facts.

#### *B. Planning Considerations*

##### *1. Goal Setting.*

The overall goal of a mitigation bank is to provide economically efficient and flexible mitigation opportunities, while fully compensating for wetland and other aquatic resource losses in a manner that contributes to the long-term ecological functioning of the watershed within which the bank is to be located. The goal will include the need to replace essential aquatic functions which are anticipated to be lost through authorized activities within the bank's service area. In some cases, banks may also be used to address other resource objectives that have been identified in a watershed management plan or other resource assessment. It is desirable to set the particular objectives for a mitigation bank (i.e., the type and character of wetlands and/or aquatic resources to be established) in advance of site selection. The goal and objectives should be driven by the anticipated mitigation need; the site selected should support achieving the goal and objectives.

## 2. Site Selection.

The agencies will give careful consideration to the ecological suitability of a site for achieving the goal and objectives of a bank, i.e., that it possess the physical, chemical and biological characteristics to support establishment of the desired aquatic resources and functions. Size and location of the site relative to other ecological features, hydrologic sources (including the availability of water rights), and compatibility with adjacent land uses and watershed management plans are important factors for consideration. It also is important that ecologically significant aquatic or upland resources (e.g., shallow sub-tidal habitat, mature forests), cultural sites, or habitat for Federally or State-listed threatened and endangered species are not compromised in the process of establishing a bank. Other significant factors for consideration include, but are not limited to, development trends (i.e., anticipated land use changes), habitat status and trends, local or regional goals for the restoration or protection of particular habitat types or functions (e.g., re-establishment of habitat corridors or habitat for species of concern), water quality and floodplain management goals, and the relative potential for chemical contamination of the wetlands and/or other aquatic resources.

Banks may be sited on public or private lands. Cooperative arrangements between public and private entities to use public lands for mitigation banks may be acceptable. In some circumstances, it may be appropriate to site banks on Federal, state, tribal or locally-owned resource management areas (e.g., wildlife management areas, national or state forests, public parks, recreation areas). The siting of banks on such lands may be acceptable if the internal policies of the public agency allow use of its land for such purposes, and the public agency grants approval. Mitigation credits generated by banks of this nature should be based solely on those values in the bank that are supplemental to the public program(s) already planned or in place, that is, baseline values represented by existing or already planned public programs, including preservation value, should not be counted toward bank credits.

Similarly, Federally-funded wetland conservation projects undertaken via separate authority and for other purposes, such as the Wetlands Reserve Program, Farmer's Home Administration fee title transfers or conservation easements, and Partners for Wildlife Program, cannot be used for the purpose of generating credits within a mitigation bank. However, mitigation credit may be given for activities undertaken in conjunction with, but supplemental to, such programs in order to maximize the overall ecological benefit of the conservation project.

## 3. Technical Feasibility.

Mitigation banks should be planned and designed to be self-sustaining over time to the extent possible. The techniques for establishing wetlands and/or other aquatic resources must be carefully selected, since this science is constantly evolving. The restoration of historic or substantially-degraded wetlands and/or other aquatic resources (e.g., prior-converted cropland, farmed wetlands) utilizing proven techniques increases the likelihood of success and typically does not result in the loss of other valuable resources. Thus, restoration should be the first option considered when siting a bank. Because of the difficulty in establishing the correct hydrologic conditions associated with many creation projects and the tradeoff in wetland functions involved with certain enhancement activities, these methods should only be considered where there are adequate assurances to ensure success and that the project will result in an overall environmental benefit.

In general, banks which involve complex hydraulic engineering features and/or questionable water sources (e.g., pumped) are most costly to develop, operate and maintain, and have a higher risk of failure than banks designed to function with little or no human intervention. The former situations should only be

considered where there are adequate assurances to ensure success. This guidance recognizes that in some circumstances wetlands must be actively managed to ensure their viability and sustainability. Furthermore, long-term maintenance requirements may be necessary and appropriate in some cases (e.g., to maintain fire-dependent plant communities in the absence of natural fire; to control invasive exotic plant species).

Proposed mitigation techniques should be well-understood and reliable. When uncertainties surrounding the technical feasibility of a proposed mitigation technique exist, appropriate arrangements (e.g., financial assurances, contingency plans, additional monitoring requirements) should be in place to increase the likelihood of success. Such arrangements may be phased-out or reduced once the attainment of prescribed performance standards is demonstrated.

#### 4. Role of Preservation.

Credit may be given when existing wetlands and/or other aquatic resources are preserved in conjunction with restoration, creation or enhancement activities, and when it is demonstrated that the preservation will augment the functions of the restored, created or enhanced aquatic resource. Such augmentation may be reflected in the total number of credits available from the bank.

In addition, the preservation of existing wetlands and/or other aquatic resources in perpetuity may be authorized as the sole basis for generating credits in mitigation banks only in exceptional circumstances, consistent with existing regulations, policies and guidance. Under such circumstances, preservation may be accomplished through the implementation of appropriate legal mechanisms (e.g., transfer of deed, deed restrictions, conservation easement) to protect wetlands and/or other aquatic resources, accompanied by **[[Page 58609]]** implementation of appropriate changes in land use or other physical changes as necessary (e.g., installation of restrictive fencing).

Determining whether preservation is appropriate as the sole basis for generating credits at a mitigation bank requires careful judgment regarding a number of factors. Consideration must be given to whether wetlands and/or other aquatic resources proposed for preservation (1) perform physical or biological functions, the preservation of which is important to the region in which the aquatic resources are located, and (2) are under demonstrable threat of loss or substantial degradation due to human activities that might not otherwise be expected to be restricted. The existence of a demonstrable threat will be based on clear evidence of destructive land use changes which are consistent with local and regional land use trends and are not the consequence of actions under the control of the bank sponsor. Wetlands and other aquatic resources restored under the Conservation Reserve Program or similar programs requiring only temporary conservation easements may be eligible for banking credit upon termination of the original easement if the wetlands are provided permanent protection and it would otherwise be expected that the resources would be converted upon termination of the easement. The number of mitigation credits available from a bank that is based solely on preservation should be based on the functions that would otherwise be lost or degraded if the aquatic resources were not preserved, and the timing of such loss or degradation. As such, compensation for aquatic resource impacts will typically require a greater number of acres from a preservation bank than from a bank which is based on restoration, creation or enhancement.

#### 5. Inclusion of Upland Areas.

Credit may be given for the inclusion of upland areas occurring within a bank only to the degree that such features increase the overall ecological functioning of the bank. If such features are included as part of a bank, it is important that they receive the same protected status as the rest of the bank and be subject



to the same operational procedures and requirements. The presence of upland areas may increase the per-unit value of the aquatic habitat in the bank. Alternatively, limited credit may be given to upland areas protected within the bank to reflect the functions inherently provided by such areas (e.g., nutrient and sediment filtration of stormwater runoff, wildlife habitat diversity) which directly enhance or maintain the integrity of the aquatic ecosystem and that might otherwise be subject to threat of loss or degradation. An appropriate functional assessment methodology should be used to determine the manner and extent to which such features augment the functions of restored, created or enhanced wetlands and/or other aquatic resources.

## **6. Mitigation Banking and Watershed Planning.**

Mitigation banks should be planned and developed to address the specific resource needs of a particular watershed. Furthermore, decisions regarding the location, type of wetlands and/or other aquatic resources to be established, and proposed uses of a mitigation bank are most appropriately made within the context of a comprehensive watershed plan. Such watershed planning efforts often identify categories of activities having minimal adverse effects on the aquatic ecosystem and that, therefore, could be authorized under a general permit. In order to reduce the potential cumulative effects of such activities, it may be appropriate to offset these types of impacts through the use of a mitigation bank established in conjunction with a watershed plan.

### ***C. Establishment of Mitigation Banks***

#### **1. Prospectus**

Prospective bank sponsors should first submit a prospectus to the Army Corps of Engineers (Corps) or Natural Resources Conservation Service (NRCS)<sup>1</sup> to initiate the planning and review process by the appropriate agencies. Prior to submitting a prospectus, bank sponsors are encouraged to discuss their proposal with the appropriate agencies (e.g., pre-application coordination).

It is the intent of the agencies to provide practical comments to the bank sponsors regarding the general need for and technical feasibility of proposed banks. Therefore, bank sponsors are encouraged to include in the prospectus sufficient information concerning the objectives for the bank and how it will be established and operated to allow the agencies to provide such feedback. Formal agency involvement and review is initiated with submittal of a prospectus.

#### **2. Mitigation Banking Instruments**

Information provided in the prospectus will serve as the basis for establishing the mitigation banking instrument. All mitigation banks need to have a banking instrument as documentation of agency concurrence on the objectives and administration of the bank. The banking instrument should describe in detail the physical and legal characteristics of the bank, and how the bank will be established and operated. For regional banking programs sponsored by a single entity (e.g., a state transportation agency), it may be appropriate to establish an "umbrella" instrument for the establishment and operation of multiple

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<sup>1</sup> The Corps will typically serve as the lead agency for the establishment of mitigation banks. Bank sponsors proposing establishment of mitigation banks solely for the purpose of complying with the "Swampbuster" provisions of FSA should submit their prospectus to the NRCS.

bank sites. In such circumstances, the need for supplemental site-specific information (e.g., individual site plans) should be addressed in the banking instrument. The banking instrument will be signed by the bank sponsor and the concurring regulatory and resource agencies represented on the Mitigation Bank Review Team (section II.C.2). The following information should be addressed, as appropriate, within the banking instrument:

- a. Bank goals and objectives;
- b. Ownership of bank lands;
- c. Bank size and classes of wetlands and/or other aquatic resources proposed for inclusion in the bank, including a site plan and specifications;
- d. Description of baseline conditions at the bank site;
- e. Geographic service area;
- f. Wetland classes or other aquatic resource impacts suitable for compensation;
- g. Methods for determining credits and debits;
- h. accounting procedures;
- i. Performance standards for determining credit availability and bank success;
- j. Reporting protocols and monitoring plan;
- k. Contingency and remedial actions and responsibilities;
- l. Financial assurances;
- m. Compensation ratios;
- n. Provisions for long-term management and maintenance.

The terms and conditions of the banking instrument may be amended, in accordance with the procedures used to establish the instrument and subject to agreement by the signatories.

In cases where initial establishment of the mitigation bank involves a discharge into waters of the United States requiring Section 10/404 authorization, the banking instrument will be made part of a Department of the Army permit for that discharge. Submittal of an **[[Page 58610]]** individual permit application should be accompanied by a sufficiently-detailed prospectus to allow for concurrent processing of each. Preparation of a banking instrument, however, should not alter the normal permit evaluation process timeframes. A bank sponsor may proceed with activities for the construction of a bank subsequent to receiving the Department of the Army authorization. It should be noted, however, that a bank sponsor who proceeds in the absence of a banking instrument does so at his/her own risk.

In cases where the mitigation bank is established pursuant to the FSA, the banking instrument will be included in the plan developed or approved by NRCS and the Fish and Wildlife Service (FWS).

### 3. Agency Roles and Coordination

Collectively, the signatory agencies to the banking instrument will comprise the Mitigation Bank Review Team (MBRT). Representatives from the Corps, EPA, FWS, National Marine Fisheries Service (NMFS) and NRCS, as appropriate given the projected use for the bank, should typically comprise the MBRT. In addition, it is appropriate for representatives from state, tribal and local regulatory and resource agencies to participate where an agency has authorities and/or mandates directly affecting or affected by the establishment, use or operation of a bank. No agency is required to sign a banking instrument; however, in signing a banking instrument, an agency agrees to the terms of that instrument.

The Corps will serve as Chair of the MBRT, except in cases where the bank is proposed solely for the purpose of complying with the FSA, in which case NRCS will be the MBRT Chair. In addition, where a bank is proposed to satisfy the requirements of another Federal, state, tribal or local program, it may be appropriate for the administering agency to serve as co-Chair of the MBRT.

The primary role of the MBRT is to facilitate the establishment of mitigation banks through the development of mitigation banking instruments. Because of the different authorities and responsibilities of each agency represented on the MBRT, there is a benefit in achieving agreement on the banking instrument. For this reason, the MBRT will strive to obtain consensus on its actions. The Chair of the MBRT will have the responsibility for making final decisions regarding the terms and conditions of the banking instrument where consensus cannot otherwise be reached within a reasonable timeframe (e.g., 90 days from the date of submittal of a complete prospectus). The MBRT will review and seek consensus on the banking instrument and final plans for the restoration, creation, enhancement, and/or preservation of wetlands and other aquatic resources.

Consistent with its authorities under Section 10/404, the Corps is responsible for authorizing use of a particular mitigation bank on a project-specific basis and determining the number and availability of credits required to compensate for proposed impacts in accordance with the terms of the banking instrument. Decisions rendered by the Corps must fully consider review agency comments submitted as part of the permit evaluation process. Similarly, the NRCS, in consultation with the FWS, will make the final decision pertaining to the withdrawal of credits from banks as appropriate mitigation pursuant to FSA.

#### 4. Role of the Bank Sponsor

The bank sponsor is responsible for the preparation of the banking instrument in consultation with the MBRT. The bank sponsor should, therefore, have sufficient opportunity to discuss the content of the banking instrument with the MBRT. The bank sponsor is also responsible for the overall operation and management of the bank in accordance with the terms of the banking instrument, including the preparation and distribution of monitoring reports and accounting statements/ledger, as necessary.

#### 5. Public Review and Comment

The public should be notified of and have an opportunity to comment on all bank proposals. For banks which require authorization under an individual Section 10/404 permit or a state, tribal or local program that involves a similar public notice and comment process, this condition will typically be satisfied through such standard procedures. For other proposals, the Corps or NRCS, upon receipt of a complete banking prospectus, should provide notification of the availability of the prospectus for a minimum 21-day public comment period. Notification procedures will be similar to those used by the Corps in the standard permit review process. Copies of all public comments received will be distributed to the other members of the MBRT and the bank sponsor for full consideration in the development of the final banking instrument.

#### 6. Dispute Resolution Procedure

The MBRT will work to reach consensus on its actions in accordance with this guidance. It is anticipated that all issues will be resolved by the MBRT in this manner.

##### a. Development of the Banking Instrument

During the development of the banking instrument, if any agency representative considers that a particular decision raises concern regarding the application of existing policy or procedures, an agency

may request, through written notification, that the issue be reviewed by the Corps District Engineer, or NRCS State Conservationist, as appropriate. Said notification will describe the issue in sufficient detail and provide recommendations for resolution. Within 20 days, the District Engineer or State Conservationist (as appropriate) will consult with the notifying agency(ies) and will resolve the issue. The resolution will be forwarded to the other MBRT member agencies. The bank sponsor may also request the District Engineer or State Conservationist review actions taken to develop the banking instrument if the sponsor believes that inadequate progress has been made on the instrument by the MBRT.

**b. Application of the Banking Instrument**

As previously stated, the Corps and NRCS are responsible for making final decisions on a project-specific basis regarding the use of a mitigation bank for purposes of Section 10/404 and FSA, respectively. In the event an agency on the MBRT is concerned that a proposed use may be inconsistent with the terms of the banking instrument, that agency may raise the issue to the attention of the Corps or NRCS through the permit evaluation process. In order to facilitate timely and effective consideration of agency comments, the Corps or NRCS, as appropriate, will advise the MBRT agencies of a proposed use of a bank. The Corps will fully consider comments provided by the review agencies regarding mitigation as part of the permit evaluation process. The NRCS will consult with FWA is making its decisions pertaining to mitigation.

If, in the view of an agency on the MBRT, an issued permit or series of permits reflects a pattern of concern regarding the application of the terms of the banking instrument, that agency may initiate review of the concern by the full MBRT through written notification to the MBRT Chair. The MBRT Chair will convene a meeting of the MBRT, or initiate another appropriate forum for communication, typically within 20 days of receipt of notification, to resolve concerns. Any such effort to address concerns **[[Page 58611]]** regarding the application of a banking instrument will not delay any decision pending before the authorizing agency (e.g., Corps or NRCS).

**D. Criteria for Use of a Mitigation Bank**

**1. Project Applicability**

All activities regulated under Section 10/404 may be eligible to use a mitigation bank as compensation for unavoidable impacts to wetlands and/or other aquatic resources. Mitigation banks established for FSA purposes may be debited only in accordance with the mitigation and replacement provisions of 7 CFR Part 12.

Credits from mitigation banks may also be used to compensate for environmental impacts authorized under other programs (e.g., state or local wetland regulatory programs, NPDES program, Corps civil works projects, Superfund removal and remedial actions). In no case may the same credits be used to compensate for more than one activity; however, the same credits may be used to compensate for an activity which requires authorization under more than one program.

**2. Relationship to Mitigation Requirements**

Under the existing requirements of Section 10/404, all appropriate and practicable steps must be undertaken by the applicant to first avoid and then minimize adverse impacts to aquatic resources, prior to authorization to use a particular mitigation bank. Remaining unavoidable impacts must be compensated to

the extent appropriate and practicable. For both the Section 10/404 and "Swampbuster" programs, requirements for compensatory mitigation may be satisfied through the use of mitigation banks when either on-site compensation is not practicable or use of the mitigation bank is environmentally preferable to on-site compensation.

It is important to emphasize that applicants should not expect that establishment of, or purchasing credits from, a mitigation bank will necessarily lead to a determination of compliance with applicable mitigation requirements (i.e., Section 404(b)(1) Guidelines or FSA Manual), or as excepting projects from any applicable requirements.

### 3. Geographic Limits of Applicability

The service area of a mitigation bank is the area (e.g., watershed, county) wherein a bank can reasonably be expected to provide appropriate compensation for impacts to wetlands and/or other aquatic resources. This area should be designated in the banking instrument. Designation of the service area should be based on consideration of hydrologic and biotic criteria, and be stipulated in the banking instrument. Use of a mitigation bank to compensate for impacts beyond the designated service area may be authorized, on a case-by-case basis, where it is determined to be practicable and environmentally desirable.

The geographic extent of a service area should, to the extent environmentally desirable, be guided by the cataloging unit of the "Hydrologic Unit map of the United States" (USGS, 1980) and the ecoregion of the "Ecoregions of the United States" (James M. Omernik, EPA, 1986) or section of the "Descriptions of the Ecoregions of the United States" (Robert G. Bailey, USDA, 1980). It may be appropriate to use other classification systems developed at the state or regional level for the purpose of specifying bank service areas, when such systems compare favorably in their objectives and level of detail. In the interest of the integrating banks with other resource management objectives, bank service areas may encompass larger watershed areas if the designation of such areas is supported by local or regional management plans (e.g., Special Area Management Plans, Advance Identification), State Wetland Conservation Plans or other Federally sponsored or recognized resource management plans. Furthermore, designation of a more inclusive service area may be appropriate for mitigation banks whose primary purpose is to compensate for linear projects that typically involve numerous small impacts in several different watersheds.

### 4. Use of a Mitigation Bank vs. On-Site Mitigation

The agencies' preference for on-site mitigation, indicated in the 1990 Memorandum of Agreement on mitigation between the EPA and the Department of the Army, should not preclude the use of a mitigation bank when there is no practicable opportunity for on-site compensation, or when use of a bank is environmentally preferable to on-site compensation. On-site mitigation may be preferable where there is a practicable opportunity to compensate for important local functions including local flood control functions, habitat for a species or population with a very limited geographic range or narrow environmental requirements, or where local water quality concerns dominate.

In choosing between on-site mitigation and use of a mitigation bank, careful consideration should be given to the likelihood for successfully establishing the desired habitat type, the compatibility of the mitigation project with adjacent land uses, and the practicability of long-term monitoring and maintenance to determine whether the effort will be ecologically sustainable, as well as the relative cost of mitigation alternatives. In general, use of a mitigation bank to compensate for minor aquatic resource impacts (e.g.,

numerous, small impacts associated with linear projects; impacts authorized under nationwide permits) is preferable to on-site mitigation. With respect to larger aquatic resource impacts, use of a bank may be appropriate if it is capable of replacing essential physical and/or biological functions of the aquatic resources which are expected to be lost or degraded. Finally, there may be circumstances warranting a combination of on-site and off-site mitigation to compensate for losses.

#### 5. In-kind vs. Out-of-kind Mitigation Determinations

In the interest of achieving functional replacement, in-kind compensation of aquatic resource impacts should generally be required. Out-of-kind compensation may be acceptable if it is determined to be practicable and environmentally preferable to in-kind compensation (e.g., of greater ecological value to a particular region). However, non-tidal wetlands should typically not be used to compensate for the loss or degradation of tidal wetlands. Decisions regarding out-of-kind mitigation are typically made on a case-by-case basis during the permit evaluation process. The banking instrument may identify circumstances in which it is environmentally desirable to allow out-of-kind compensation within the context of a particular mitigation bank (e.g., for banks restoring a complex of associated wetland types). Mitigation banks developed as part of an area-wide management plan to address a specific resource objective (e.g., restoration of a particularly vulnerable or valuable wetland habitat type) may be such an example.

#### 6. Timing of Credit Withdrawal

The number of credits available for withdrawal (i.e., debiting) should generally be commensurate with the level of aquatic functions attained at a bank at the time of debiting. The level of function may be determined through the application of performance standards tailored to the specific restoration, creation or enhancement activity at the bank site or through the use of an appropriate functional assessment methodology. **[[Page 58612]]**

The success of a mitigation bank with regard to its capacity to establish a healthy and fully functional aquatic system relates directly to both the ecological and financial stability of the bank. Since financial considerations are particularly critical in early stages of bank development, it is generally appropriate, in cases where there is adequate financial assurance and where the likelihood of the success of the bank is high, to allow limited debiting of a percentage of the total credits projected for the bank at maturity. Such determinations should take into consideration the initial capital costs needed to establish the bank, and the likelihood of its success. However, it is the intent of this policy to ensure that those actions necessary for the long-term viability of a mitigation bank be accomplished prior to any debiting of the bank. In this regard, the following minimum requirements should be satisfied prior to debiting: (1) banking instrument and mitigation plans have been approved; (2) bank site has been secured; and (3) appropriate financial assurances have been established. In addition, initial physical and biological improvements should be completed no later than the first full growing season following initial debiting of a bank. The temporal loss of functions associated with the debiting of projected credits may justify the need for requiring higher compensation ratios in such cases. For mitigation banks which propose multiple-phased construction, similar conditions should be established for each phase.

Credits attributed to the preservation of existing aquatic resources may become available for debiting immediately upon implementation of appropriate legal protection accompanied by appropriate changes in land use or other physical changes, as necessary.

## **7. Crediting/Debiting/Accounting Procedures**

Credits and debits are the terms used to designate the units of trade (i.e., currency) in mitigation banking. Credits represent the accrual or attainment of aquatic functions at a bank; debits represent the loss of aquatic functions at an impact or project site. Credits are debited from a bank when they are used to offset aquatic resource impacts (e.g., for the purpose of satisfying Section 10/404 permit or FSA requirements).

An appropriate functional assessment methodology (e.g., Habitat Evaluation Procedures, hydrogeomorphic approach to wetlands functional assessment, other regional assessment methodology) acceptable to all signatories should be used to assess wetland and/or other aquatic resource restoration, creation and enhancement activities within a mitigation bank, and to quantify the amount of available credits. The range of functions to be assessed will depend upon the assessment methodology identified in the banking instrument. The same methodology should be used to assess both credits and debits. If an appropriate functional assessment methodology is impractical to employ, acreage may be used as a surrogate for measuring function. Regardless of the method employed, the number of credits should reflect the difference between site conditions under the with-and without-bank scenarios.

The bank sponsor should be responsible for assessing the development of the bank and submitting appropriate documentation of such assessments to the authorizing agency(ies), who will distribute the documents to the other members of the MBRT for review. Members of the MBRT are encouraged to conduct regular (e.g., annual) on-site inspections, as appropriate, to monitor bank performance. Alternatively, functional assessments may be conducted by a team representing involved resources and regularly agencies and other appropriate parties. The number of available credits in a mitigation bank may need to be adjusted to reflect actual conditions.

The banking instrument should require that bank sponsors establish and maintain an accounting system (i.e., ledger) which documents the activity of all mitigation bank accounts. Each time an approved debit/credit transaction occurs at a given bank, the bank sponsor should submit a statement to the authorizing agency(ies). The bank sponsor should also generate an annual ledger report for all mitigation bank accounts to be submitted to the MBRT Chair for distribution to each member of the MBRT.

Credits may be sold to third parties. The cost of mitigation credits to a third party is determined by the bank sponsor.

## **8. Party Responsible for Bank Success**

The bank sponsor is responsible for assuring the success of the debited restoration, creation, enhancement and preservation activities at the mitigation bank, and it is therefore extremely important that an enforceable mechanism be adopted establishing the responsibility of the bank sponsor to develop and operate the bank properly. Where authorization under Section 10/404 and/or FSA is necessary to establish the bank, the Department of the Army permit or NRCS plan should be conditioned to ensure that provisions of the banking instrument are enforceable by the appropriate agency(ies). In circumstances where establishment of a bank does not require such authorization, the details of the bank sponsor's responsibilities should be delineated by the relevant authorizing agency (e.g., the Corps in the case of Section 10/404 permits) in any permit in which the permittee's mitigation obligations are met through use of the bank. In addition, the bank sponsor should sign such permits for the limited purpose of meeting those mitigation responsibilities, thus confirming that those responsibilities are enforceable against the bank sponsor if necessary.

### *E. Long-Term Management, Monitoring and Remediation*

#### 1. Bank Operational Life

The operational life of a bank refers to the period during which the terms and conditions of the banking instrument are in effect. With the exception of arrangements for the long-term management and protection in perpetuity of the wetlands and/or other aquatic resources, the operational life of a mitigation bank terminates at the point when (1) Compensatory mitigation credits have been exhausted or banking activity is voluntarily terminated with written notice by the bank sponsor provided to the Corps or NRCS and other members of the MBRT, and (2) it has been determined that the debited bank is functionally mature and/or self-sustaining to the degree specified in the banking instrument.

#### 2. Long-term Management and Protection

The wetlands and/or other aquatic resources in a mitigation bank should be protected in perpetuity with appropriate real estate arrangements (e.g., conservation easements, transfer of title to Federal or State resource agency or non-profit conservation organization). Such arrangements should effectively restrict harmful activities (i.e., incompatible uses<sup>2</sup>) that might otherwise jeopardize the purpose of the bank. In exceptional circumstances, real estate arrangements may be approved which dictate finite protection for a bank (e.g., for coastal protection projects which prolong the ecological viability of **[Page 58613]** the aquatic system). However, in no case should finite protection extend for a lesser time than the duration of project impacts for which the bank is being used to provide compensation.

The bank sponsor is responsible for securing adequate funds for the operation and maintenance of the bank during its operational life, as well as for the long-term management of the wetlands and/or other aquatic resources, as necessary. The banking instrument should identify the entity responsible for the ownership and long-term management of the wetlands and/or other aquatic resources. Where needed, the acquisition and protection of water rights should be secured by the bank sponsor and documented in the banking instrument.

#### 3. Monitoring Requirements

The bank sponsor is responsible for monitoring the mitigation bank in accordance with monitoring provisions identified in the banking instrument to determine the level of success and identify problems requiring remedial action. Monitoring provisions should be set forth in the banking instrument and based on scientifically sound performance standards prescribed for the bank. Monitoring should be conducted at time intervals appropriate for the particular project type and until such time that the authorizing agency(ies), in consultation with the MBRT, are confident that success is being achieved (i.e., performance standards are attained). The period for monitoring will typically be five years; however, it may be necessary to extend this period for projects requiring more time to reach a stable condition (e.g., forested wetlands) or where remedial activities were undertaken. Annual monitoring reports should be submitted to the authorizing agency(ies), who is responsible for distribution to the other members of the MBRT, in accordance with the terms specified in the banking instrument.

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<sup>2</sup> For example, certain silvicultural practices (e.g., clear cutting and/or harvests on short-term rotations) may be incompatible with the objectives of a mitigation bank. In contrast, silvicultural practices such as long-term rotations, selective cutting, maintenance of vegetation diversity, and undisturbed buffers are more likely to be considered a compatible use.



#### **4. Remedial Action**

The banking instrument should stipulate the general procedures for identifying and implementing remedial measures at a bank, or any portion thereof. Remedial measures should be based on information contained in the monitoring reports (i.e., the attainment of prescribed performance standards), as well as agency site inspections. The need for remediation will be determined by the authorizing agency(ies) in consultation with the MBRT and bank sponsor.

#### **5. Financial Assurances**

The bank sponsor is responsible for securing sufficient funds or other financial assurances to cover contingency actions in the event of bank default or failure. Accordingly, banks posing a greater risk of failure and where credits have been debited, should have comparatively higher financial sureties in place, than those where the likelihood of success is more certain. In addition, the bank sponsor is responsible for securing adequate funding to monitor and maintain the bank throughout its operational life, as well as beyond the operational life if not self-sustaining. Total funding requirements should reflect realistic cost estimates for monitoring, long-term maintenance, contingency and remedial actions.

Financial assurances may be in the form of performance bonds, irrevocable trusts, escrow accounts, casualty insurance, letters of credit, legislatively-enacted dedicated funds for government operate banks or other approved instruments. Such assurances may be phased-out or reduced, once it has been demonstrated that the bank is functionally mature and/or self-sustaining (in accordance with performance standards).

#### ***F. Other Considerations***

##### **1. In-lieu-fee Mitigation Arrangements.**

For purposes of this guidance, in-lieu-fee, fee mitigation, or other similar arrangements, wherein funds are paid to a natural resource management entity for implementation of either specific or general wetland or other aquatic resource development projects, are not considered to meet the definition of mitigation banking because they do not typically provide compensatory mitigation in advance of project impacts. Moreover, such arrangements do not typically provide a clear timetable for the initiation of mitigation efforts. The Corps, in consultation with the other agencies, may find there are circumstances where such arrangements are appropriate so long as they meet the requirements that would otherwise apply to an offsite, prospective mitigation effort and provides adequate assurances of success and timely implementation. In such cases, a formal agreement between the sponsor and the agencies, similar to a banking instrument, is necessary to define the conditions under which its use is considered appropriate.

##### **2. Special Considerations for "Swampbuster"**

Current FSA legislation limits the extent to which mitigation banking can be used for FSA purposes. Therefore, if a mitigation bank is to be used for FSA purposes, it must meet the requirements of FSA.

### III. DEFINITIONS

For the purposes of this guidance document the following terms are defined:

A. *Authorizing agency*. Any Federal, state, tribal or local agency that has authorized a particular use of a mitigation bank as compensation for an authorized activity; the authorizing agency will typically have the enforcement authority to ensure that the terms and conditions of the banking instrument are satisfied.

B. *Bank sponsor*. Any public or private entity responsible for establishing and, in most circumstances, operating a mitigation bank.

C. *Compensatory mitigation*. For purposes of Section 10/404, compensatory mitigation is the restoration, creation, enhancement, or in exceptional circumstances, preservation of wetlands and/or other aquatic resources for the purpose of compensating for unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.

D. *Consensus*. The term consensus, as defined herein, is a process by which a group synthesizes its concerns and ideas to form a common collaborative agreement acceptable to all members. While the primary goal of consensus is to reach agreement on an issue by all parties, unanimity may not always be possible.

E. *Creation*. The establishment of a wetland or other aquatic resource where one did not formerly exist.

F. *Credit*. A unit of measure representing the accrual or attainment of aquatic functions at a mitigation bank; the measure of function is typically indexed to the number of wetland acres restored, created, enhanced or preserved.

G. *Debit*. A unit of measure representing the loss of aquatic functions at an impact or project site.

H. *Enhancement*. Activities conducted in existing wetlands or other aquatic resources which increase one or more aquatic functions.

I. *Mitigation*. For purposes of Section 10/404 and consistent with the Council on Environmental Quality regulations, the Section 404(b)(1) Guidelines and the Memorandum of Agreement Between [[Page 58614]] the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines, mitigation means sequentially avoiding impacts, minimizing impacts, and compensating for remaining unavoidable impacts.

J. *Mitigation bank*. A mitigation bank is a site where wetlands and/or other aquatic resources are restored, created, enhanced, or in exceptional circumstances, preserved expressly for the purpose of providing compensatory mitigation in advance of authorized impacts to similar resources. For purposes of Section 10/404, use of a mitigation bank may only be authorized when impacts are unavoidable.

K. *Mitigation Bank Review Team (MBRT)*. An interagency group of Federal, state, tribal and/or local regulatory and resource agency representatives which are signatory to a banking instrument and oversee the establishment, use and operation of a mitigation bank.

L. *Practicable*. Available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

M. *Preservation*. The protection of ecologically important wetlands or other aquatic resources in perpetuity through the implementation of appropriate legal and physical mechanisms. Preservation may include protection of upland areas adjacent to wetlands as necessary to ensure protection and/or enhancement of the aquatic ecosystem.

N. *Restoration*. Re-establishment of wetland and/or other aquatic resource characteristics and function(s) at a site where they have ceased to exist, or exist in a substantially degraded state.

O. *Service area*. The service area of a mitigation bank is the designated area (e.g., watershed, county) wherein a bank can reasonably be expected to provide appropriate compensation for impacts to wetlands

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and/or other aquatic resources.

John H. Zirschky, *Acting Assistant Secretary (Civil Works), Department of the Army.*

Robert Perciasepe, *Assistant Administrator for Water, Environmental Protection Agency.*

Thomas R. Hebert, *Acting Undersecretary for Natural Resources and Environment, Department of Agriculture.*

Robert P. Davison, *Acting Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior.*

Douglas K. Hall, *Assistant Secretary for Oceans and Atmosphere, Department of Commerce.*

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